

IN THE COURT OF APPEALS OF IOWA

No. 0-661 / 09-0599
Filed October 20, 2010

KEVIN B. ADAMS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Appellant appeals the district court's ruling dismissing his application for post-conviction relief. **AFFIRMED.**

Marc Elcock, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Celene Gogerty, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Kevin Adams appeals the district court's dismissal of his application for post-conviction relief. He asserts the court erred when it granted the State's motion for summary judgment and refused to reinstate his post-conviction case, which was dismissed pursuant to Iowa Rule of Civil Procedure 1.944. He also asserts post-conviction counsel was ineffective for failing to take action when the rule 1.944 notice from the court was received.

I. Background Facts and Proceedings

Adams pled guilty on July 7, 2006, to the charge of obtaining or attempting to obtain a prescription drug by fraud, deceit, misrepresentation or subterfuge in violation of Iowa Code sections 124.401(1)(c)(8), 155A.23, and 155A.24. On July 27, a jury found Adams guilty of theft in the second degree in violation of sections 714.1 and 714.2(2). On August 28, the district court entered judgment and imposed sentences of ten years and five years, respectively on Adams's convictions, with the sentences to run consecutive to each other. In the same order, the court suspended the sentences and placed Adams on probation for two years.

In November 2006, Adams stipulated that he had violated the terms of his probation. In December, Adams's probation officer reported a second probation violation, followed by a charge of escape in January 2007. Adams again stipulated that he did violate the terms and conditions of his probation. Following a disposition hearing in February, Adams's probation was revoked, and his original sentence of incarceration was imposed.

Adams filed an application for post-conviction relief on April 10, 2007, and an additional application on June 5. On July 17, 2008, Iowa Rule of Civil Procedure 1.944 dismissal notices were sent to Adams for both cases, advising him that the cases were subject to dismissal on January 1, 2009, if not tried by that date. Although no hearing date was set, Adams filed a pro se request for relief from rule 1.944 on October 27, 2008, seeking a “continuance.” On November 6, 2008, the court consolidated the April and June post-conviction relief applications and appointed counsel for Adams. On January 26, 2009, Adams’s counsel moved for a ruling on Adams’s October 27, 2008 pro se request for a continuance. The State filed a motion for summary judgment on January 29, 2009, seeking dismissal of the applications under rule 1.944. Following a February 26, 2009 hearing, the court sustained the State’s motion, finding the case had been dismissed by operation of rule 1.944 on January 1, 2009. Adams appeals.

II. Dismissal and Reinstatement

Adams asserts the court erred when it granted the State’s motion for summary judgment and in refusing to reinstate his post-conviction case. Under rule 1.944, a review of a mandatory reinstatement determination is for errors at law; a review of a discretionary reinstatement is for an abuse of discretion. *Walker v. State*, 572 N.W.2d 589, 590 (Iowa 1997); *Tiffany v. Brenton State Bank of Jefferson*, 508 N.W.2d 87, 91 (Iowa Ct. App. 1993). The district court’s fact finding is binding on us if supported by substantial evidence. *Tiffany*, 508 N.W.2d at 90. We review a ruling on a motion for summary judgment for correction of errors at law. *Manning v State*, 654 N.W.2d 555, 560 (Iowa 2002)

(discussing the principles underlying summary judgment procedure apply to dispositions of an application for postconviction relief.)

Adams claims that if the case was subject to rule 1.944 dismissal, it should be reinstated pursuant to 1.944(6). Rule 1.944 reads in relevant part,

1.944(1) It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.

1.944(2) All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be tried prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in rule 1.442 of the docket number, the names of parties, counsel appearing, and date of filing petition. The notice shall state that such case will be subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte.

1.944(6) The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefor, shall be filed within six months from the date of dismissal.

Reinstatement of civil actions dismissed under rule 1.944 can occur in two ways: mandatory reinstatement, which requires a showing that the dismissal was a result of oversight, mistake or other reasonable cause; or discretionary reinstatement, based upon the discretion of the district court. *O'Brien v. Mullapudi*, 405 N.W.2d 815, 816–17 (Iowa 1987). Whether a claim for reinstatement is understood as mandatory or discretionary, the party requesting relief has the burden to prove reasonable diligence in the preparation of the case for trial. *Berkley Int'l. Co. Ltd. v. Devine*, 423 N.W.2d 9, 12 (Iowa 1988).

In the November 6, 2008 order consolidating Adams's two pro se applications and appointing counsel, the district court specifically noted, "court-appointed counsel and the Petitioner are advised that this case is currently under a Rule 1.944 Dismissal Notice and they should take note and govern themselves accordingly." While Adams asserts it was "reasonable" to believe that after consolidation, the motion for continuance "would still be pending," the responsibility for keeping a case alive rests "squarely on the shoulders of the party seeking to avoid dismissal." *Greif v. K-Mart Corp.*, 404 N.W.2d 151, 154 (Iowa 1987). It was Adams's responsibility, not the court's, to obtain an order of continuance before the automatic dismissal occurred. *Sanchez v. Kilts*, 459 N.W.2d 646, 649 (Iowa Ct. App. 1990). The mere filing of a motion for continuance before the rule 1.944 deadline approaches does not stay the dismissal of the case. *Tiffany*, 508 N.W.2d at 91–92. Counsel for Adams did not request a ruling on Adams's pro se request for continuance until January 26, 2009. Dismissal under rule 1.944 was automatic on January 1, and needed no order of dismissal. *Id.* We find substantial evidence to affirm the district court's grant of summary judgment dismissing Adams's application for post-conviction relief pursuant to rule 1.944.

The district court also found,

It was incumbent upon the Petitioner and/or his attorney equally to have obtained such relief [from Rule 1.944], especially since the Court specifically notified them in its Order dated November 6, 2008, that the case was under a 1.944 Dismissal Notice. It is not the Court's responsibility to insure a relief order is entered. The Court does not find a sufficient basis exists to find mistake, oversight, or excusable neglect.

We agree with the district court that Adams did not meet his burden to prove reasonable diligence in the preparation of the case for trial and no showing was made of any grounds justifying either mandatory or discretionary reinstatement. See Iowa R. Civ. P. 1.944(6); *O'Brien*, 405 N.W.2d at 819.

III. Ineffective Assistance of Counsel

Adams next asserts his post-conviction counsel was ineffective for failing to take action on the rule 1.944 notice from the court. We review ineffective-assistance-of-counsel claims de novo. *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure. *Id.* A petitioner has no federal constitutional rights to counsel in post-conviction relief proceedings; nevertheless once counsel is appointed in a post-conviction proceeding, the petitioner has a right to the effective assistance of this counsel. See *Fuhrmann v. State*, 433 N.W.2d 720, 722 (Iowa 1988) (explaining no federal constitutional right to counsel); *Patchette v. State*, 374 N.W.2d 397, 398 (Iowa 1985) (explaining right to effective counsel). “If [] the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court’s view of the potential viability of the claim.” *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

In the order for consolidation and appointment of counsel, the district court instructed Adams’s post-conviction counsel,

Petitioner’s counsel shall confer with Petitioner and otherwise investigate the basis of Petitioner’s Applications of Post-Conviction Relief. Petitioner’s counsel shall determine whether Petitioner’s

Applications should be amended and, if necessary, file an Amended and Substituted Application.

Following counsel's inaction on the rule 1.944 notices from the court, at the summary judgment hearing, post-conviction counsel stated,

I believe I restated it in my resistance that I filed on the 24th, simply that these were originally two different cases and a motion to continue had been filed on one, and it was just an attorney oversight and my fault that it was not—another one was not filed on the consolidated case number. And I would hate to have that reflected in—for my client in the dismissal of this matter.

We find the record insufficient to address Adams's claim of ineffective assistance of post-conviction counsel, and therefore preserve this issue for a possible post-conviction proceeding in order to allow post-conviction counsel an opportunity to respond to the allegations. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). (“[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims.”).

AFFIRMED.